



**DEPARTMENT OF TRANSPORTATION**

**[4910-EX-P]**

**Federal Motor Carrier Safety Administration**

**[Docket No. FMCSA-2014-0071]**

**Hours of Service of Drivers: McKee Foods Transportation, LLC, Application for Exemption**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition; grant of application for exemption.

**SUMMARY:** FMCSA announces its decision to grant an exemption to McKee Foods Transportation, LLC (MFT) from certain provisions of the Agency's hours-of-service (HOS) regulations. MFT proposed that its team drivers be granted an exemption from the HOS rules pertaining to use of a sleeper berth (SB). Current HOS rules require that all SB rest regimens include, in part, the use of an SB for at least 8 hours--combined with a separate period of at least 2 hours, either in the SB, off-duty or some combination of both--to gain the equivalent of at least 10 consecutive hours off duty. The exemption will allow MFT's team drivers to take the equivalent of 10 consecutive hours off duty by splitting SB time into two periods totaling 10 hours, provided neither of the two periods is less than 3 hours.

**DATES:** This exemption is effective March 27, 2015 and expires on March 27, 2016.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Pearlie Robinson, Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202-366-4325, E-mail: [MCPSD@dot.gov](mailto:MCPSD@dot.gov), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001.

Docket: For access to the docket to read background documents or comments submitted to notice requesting public comments on the exemption application, go to [www.regulations.gov](http://www.regulations.gov) at any time or visit Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line Federal document management system is available 24 hours each day, 365 days each year. The docket number is listed at the beginning of this notice.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also

specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

### **Request for Exemption**

MFT is a private carrier that sells fresh snack food products under the Little Debbie, Sunbelt, and Drake's brands. MFT delivers products in interstate commerce to 48 states and parts of Canada from three manufacturing distribution centers and one stand-alone distribution center. MFT employs approximately 650 drivers, using more than 300 tractor-trailer combinations. MFT's average driver is on duty approximately 35 – 45 hours per week with the majority of the on-duty time split between driving and unloading the trailer. A typical trip averages six stops. Some of the trips make backhauls – both private and for-hire. The average round trip is about 1,000 miles. A team usually delivers two trailer loads per week, with time at home between most trips.

MFT states that it operates on a routine weekly cycle. Each workweek contains a regular subset of daily cycles dispatching and returning long-, medium- and short-range trips. MFT advises that it has a constant flow of outbound and inbound trucks that allow it to continuously ship fresh-baked goods and return with backhauls of raw materials and other for-hire loads. The routine cycles allow most of the drivers to have regular schedules. Many of MFT's drivers are off duty at least 48 consecutive hours every week while many others are off duty at least 72 consecutive hours. MFT's tractors are equipped with double-bunk sleepers in the event both drivers need or want to rest at the same time. Drivers are allowed to make their own decisions about when and where to take short rest breaks based on their personal needs and preferences in conformance with current regulatory requirements. MFT advises that it takes driver safety, health and wellness seriously, and hires well-qualified drivers who go through a comprehensive

orientation/new hire training program. MFT's trucks are equipped with automatic on-board recording devices (AOBRDs) that produce electronic records of duty status.

MFT requested an exemption from the current regulations for its delivery shipments and backhaul activity operations to eliminate the requirement that SB time include a period of at least 8 but less than 10 consecutive hours in the SB and a separate period of at least 2 but less than 10 consecutive hours either in the SB or off duty, or any combination thereof (49 CFR 395.1(g)(1)(ii)(A)(1)). MFT proposed that these team drivers be allowed to split SB time into two periods totaling at least 10 hours, provided neither of the two periods is less than 3 hours in length. The exemption would be limited to team drivers.

MFT states that the activities of its team drivers involve both driving and offloading product to its customers. The drivers average approximately 53 hours per week on the road away from home. MFT states that approximately 30 percent of this time is spent in the sleeper. MFT contends that the experience of its drivers has demonstrated that sleeping in a moving vehicle is more difficult than in a stopped truck. According to MFT, having the flexibility to switch with a partner allows each driver to take advantage of shorter time periods when they may feel fatigued. MFT further stated, this will result in a more-flexible work pattern, allowing both drivers to perform warehouse functions together (to reduce driver unloading time and improve maneuvering in the warehouse), and improving personal and vehicular safety.

MFT states that it is committed to maintaining its outstanding safety record by focusing on continuous improvement, promoting technologies to enhance safety, conducting thorough inspections and having well-communicated policies in place to address both safety and compliance-related topics. MFT identified some

countermeasures it would take to maintain safe operations if the exemption is granted.

The safeguards include, but are not limited to:

- Every week, all transportation operations shut down one hour prior to sundown on Friday until one hour after sundown on Saturday, resulting in an automatic minimum 26 hour off-duty home time for all drivers in addition to two or three days home time during the week;
- All tractors are equipped with speed limiters;
- Drivers use AOBDRs to track their duty time and HOS compliance;
- Drive time is reduced from 11 hours to 10 hours. Team drivers are limited to 10 hours of driving prior to completing their required 10 hours total SB.
- Behavior-based event data is monitored from the enhanced AOBDRs to improve safety measures already in place to help reduce the probability of accidents on the road.

MFT believes that by allowing its team drivers to exercise flexibility in their SB requirements, the drivers would experience more quality rest. To support its request for the exemption, MFT cited the results of an FMCSA-sponsored study entitled “Investigation of the Effects of Split Sleep Schedules on Commercial Vehicle Driver Safety and Health.”<sup>1</sup> The report noted “that when consolidated nighttime sleep is not possible, split sleep is preferable to consolidated daytime sleep.”

([http://ntl.bts.gov/lib/51000/51200/51254/12-003-Split-Sleep\\_Investigation-of-the-Effects-of-Split-Sleep-Schedules-on-Commercial-Vehicle-Driver-Safety-and-Health-508.pdf](http://ntl.bts.gov/lib/51000/51200/51254/12-003-Split-Sleep_Investigation-of-the-Effects-of-Split-Sleep-Schedules-on-Commercial-Vehicle-Driver-Safety-and-Health-508.pdf))

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<sup>1</sup> Belenky, G., Jackson, M.L., Tompkins, L., Satterfield, B., Bender, A., “Investigation of the Effects of Split Sleep Schedules on Commercial Vehicle Driver Safety and Health,” FMCSA, Dec. 2012.

A copy of MFT's application for exemption is available for review in the docket for this notice.

### **Public Comments**

On May 12, 2014, FMCSA published notice of this application, and asked for public comment (79 FR 27041). Twelve commenters responded. Eight commenters supported the application, three commenters opposed it and one individual commented but did not indicate whether he supported or opposed the application.

The three comments opposing the exemption were from two individuals and the Advocates for Highway and Auto Safety (Advocates). Mr. Charles McKown said, "I am EXTREMELY opposed." Mr. Michael Millard said, "The request for an exemption from the HOS sets in motion a slippery slope; whereas, if the FMCSA grants the exemption they are indicating the current HOS is not suitable for acquiring the needed rest. If FMCSA grants the exemption they can expect to be hounded by other motor carriers to participate in the exemption or submit a new exemption based on the individual carrier's needs. If the exemption is approved then it creates problems for MCSAP officers performing roadside inspections as the MCSAP officers would have to be trained on how to calculate the HOS sleeper berth provision costing the tax payers thousands if not hundreds of thousands of dollars in training the MCSAP officers."

The Advocates stated that, "The applicant has provided no definitive proof that the proposed alternative HOS, changing the sleeper berth requirements to allow sleeper berth periods to be broken into two periods of no less than 3 hours, would in any way ensure safety or address the agency's concerns regarding acute and cumulative fatigue which was the impetus for the requirement." The Advocates contend that the controls

listed by MFT in no way constitute a safety analysis on par with that required by statute. Seven comments supporting the application were submitted by MFT employees.

The American Trucking Associations, Inc. (ATA) also supports the exemption. The ATA said, “ATA strongly supports McKee Foods Transportation, LLC’s (MFT) application for exemption from 49 C.F.R. §395.1(g)(1)(ii)(A)(1-2). ATA has long contended that the currently prescribed sleeper berth rules do not introduce enough flexibility into the delicate equation of driver rest, sleep and performance. MFT’s application for exemption provides FMCSA with an excellent opportunity to observe the safety and, perhaps health benefits of allowing additional flexibility into sleeper berth utilization and should be granted without delay.”

All comments are available for review in the docket for this notice.

### **FMCSA Response to Public Comments and Agency Decision**

Prior to publishing the **Federal Register** notice announcing the receipt of MFT’s exemption request, FMCSA ensured that MFT has a current USDOT registration, minimum required levels of insurance, and is not subject to any “imminent hazard” or other out-of-service (OOS) orders. The Agency conducted a comprehensive evaluation of the safety performance history of the applicant during the review process. As part of this process, FMCSA reviewed its Motor Carrier Management Information System safety records for MFT, including inspection and accident reports submitted to FMCSA by State agencies.

With regard to Mr. Millard’s comments, the Agency does not believe that an exemption from the SB requirement is an indication that the current HOS is not suitable for acquiring needed rest. An exemption in this instance would only provide flexibility of how the 10 hours in the SB are split but does not reduce the 10 hour rest requirement.

Split SB periods were allowed prior to 2003; therefore, many MCSAP officers remain familiar with it, and training others can be done economically through existing, continuing training methods.

With regard to the Advocates comments, the Agency believes that the FMCSA-sponsored study entitled “Investigation of the Effects of Split Sleep Schedules on Commercial Vehicle Driver Safety and Health”<sup>2</sup> cited by MFT provides a reasonable basis for an exemption of this type, which will enable FMCSA to observe the effects of split sleep in a real world context over a substantial time period.

The Agency is well aware that preventing fatigue is a complex process taking into account numerous factors such as time of day, amount and timing of sleep, time awake and time on task. The Agency believes that the controls identified in MFT’s application, including a 26-hour off duty period every week, reduction of daily driving time from 11 hours to 10 hours and monitoring data from AOBRDs, will ensure that safety is not adversely affected.

The FMCSA has evaluated MFT’s application, safety record, and the public comments. The Agency believes that MFT will likely achieve a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption [49 CFR 381.305(a)], and grants the requested exemption covering the operations of team drivers employed by MFT.

## **Terms and Conditions of the Exemption**

### **Period of the Exemption**

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<sup>2</sup> Belenky, G., Jackson, M.L., Tompkins, L., Satterfield, B., Bender, A., “Investigation of the Effects of Split Sleep Schedules on Commercial Vehicle Driver Safety and Health,” FMCSA, Dec. 2012.



This exemption from the requirements of 49 CFR 395.1(g)(1)(ii)(A)(1-2)) is effective during the period of March 27, 2015 through March 27, 2016. The exemption will expire on March 27, 2016, 11:59 p.m. local time, unless renewed.

#### Extent of the Exemption

The team drivers employed by MFT are provided a limited exemption from the SB requirements of 49 CFR 395.1(g)(1)(ii)(A)(1-2)) to allow these drivers to split SB time into two periods totaling at least 10 hours, provided neither of the two periods is less than 3 hours in length. Team drivers will use electronic logging devices to track records of duty status; have a minimum 26-hour off-duty period, at home, from Friday night to Saturday night; and, be limited to 10 hours of driving following their required 10 consecutive hours off duty, or the SB equivalent.

#### Other Conditions

The exemption is contingent upon MFT maintaining USDOT registration, minimum levels of public liability insurance, and not being subject to any “imminent hazard” or other OOS order issued by FMCSA. Each team driver covered by the exemption must maintain a valid CDL with the required endorsements, not be subject to any OOS order or suspension of driving privileges, and meet all physical qualifications required by 49 CFR part 391.

#### Preemption

During the period this exemption is in effect, no State may enforce any law or regulation that conflicts with or is inconsistent with the exemptions with respect to a person or entity operating under the exemptions (49 U.S.C. 31315(d)).

#### FMCSA Accident Notification

MFT must notify FMCSA within 5 business days of any accidents (as defined by 49 CFR 390.5) involving the operation of any of its CMVs while utilizing this exemption. The notification must be by email to MCPSD@DOT.GOV, and include the following information:

- a. Date of the accident,
- b. City or town, and State, in which the accident occurred, or which is closest to the scene of the accident,
- c. Driver's name and driver's license number,
- d. Vehicle number and State license number,
- e. Number of individuals suffering physical injury,
- f. Number of fatalities,
- g. The police-reported cause of the accident,
- h. Whether the driver was cited for violation of any traffic laws, or motor carrier safety regulations, and
- i. The total driving time and the total on-duty time of the CMV driver at the time of the accident.

#### Termination

The FMCSA does not believe the team drivers covered by the exemption will experience any deterioration of their safety record. However, should this occur, FMCSA will take all steps necessary to protect the public interest, including revocation of the exemption. The FMCSA will immediately revoke the exemption for failure to comply with its terms and conditions.

Issued on: March 19, 2015

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T. F. Scott Darling, III  
Acting Administrator

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